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CITATIONS

682541—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 78–90) are not as yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered October 1, 1945 (R. 91). The petition for a writ of certiorari was filed December 26, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925 as amended.

QUESTIONS PRESENTED

A contract for the construction of a public work provided that persons employed on the project should be referred for assignment to work on such project by the United States Employment Service, and that 90% of the labor so employed should be taken from relief rolls.

The substantial question arising in a suit on this contract seeking damages from the United States for delay resulting from labor shortages is whether this provision made the United States an insurer of the contractor's labor supply, or whether the United States discharged its obligation when it applied the provisions of the contract with fair consideration for the problems and difficulties of the contractor, making it possible to get his work done by granting exemptions from the relief labor requirement and by granting extensions of time for completion to allow for labor shortages.

STATUTES, REGULATIONS AND CONTRACT PROVISIONS INVOLVED

The applicable portions of the statutes, regulations and contract provisions involved are set forth in the Appendix, *infra*, pp. 18–22.

STATEMENT

The pertinent facts as found by the Court of Claims may be summarized as follows:[1]

[1] Petitioner did not proceed under Rule 99 (b) of the Court of Claims to have any of the evidence certified. Accord-

On August 5, 1935, petitioner entered into a contract with the United States to construct Lock and Dam No. 9 and to perform alterations on Dam No. 8, Allegheny River, Pennsylvania, within 450 calendar days after date of notice to proceed (R. 45–46). During the performance of the work, the contract was modified by 19 change orders, and the time for completion was extended 468 calendar days, thus fixing March 31, 1938 as the completion date (R. 46). The work was not completed until October 6, 1938, and liquidated damages in the sum of $50,375 were assessed against petitioner. However, the Chief of Engineers granted an additional extension of time of 189 days, thus excusing the delay, and the amount of $50,375 which had been withheld as liquidated damages, was thereafter paid to petitioner (R. 46).

Article 19 (a) of the contract provided that all persons employed on the project (except supervisory, administrative, and highly skilled workers) should be referred for assignment to such work by the United States Employment Service

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ingly, the record before this Court, so far as facts are concerned, consists exclusively of the special findings of fact made by the court below. A large part of petitioner's statement is argumentative and has no basis in the record, *e. g.*, that petitioner would have completed the work in 1937 (Pet. 10); that it required through June 14, 1938 to repair damages caused by winter floods (Pet. 9); and that there was at all times an adequate supply of employables available (Pet. 11).

and that, except under specific exemption by the Works Progress Administration, at least 90% of all such unskilled labor should be taken from the public relief rolls (R. 48). Westmoreland and Armstrong Counties, Pennsylvania, the sources from which petitioner was to draw its labor, were largely rural (R. 50). Petitioner made an investigation of the labor situation, and, at the time it commenced work, the number of persons on relief in the two counties was sufficient to supply the project with the required amount of labor (R. 50–51). However, during the course of the performance of petitioner's work, other projects, undertaken to relieve unemployment, absorbed much of the relief labor (R. 50).

In the course of petitioner's operations, the United States Employment Service through the National Reemployment Service (N. R. S.), referred to petitioner's project all labor in the appropriate classifications available under its rules and regulations (R. 54).[2] The Works Progress

[2] The court below found (R. 51):

"The procedure for requisitioning and referral of workmen to plaintiff's project was explained to plaintiff by NRS during the early part of the job. At the beginning of the project, when a requisition came in, the NRS office selected from names of workmen registered in its office all persons in the categories requisitioned who were on relief, considered their qualifications for employment and referred to the contractor those it deemed qualified. Subsequently, the procedure was changed so that when a requisition was received at the employment office, NRS would requisition from the

Administration (W. P. A.), which made relief labor available to N. R. S. declined in some instances to make such labor available when it was employed on other projects, which related to health or public safety, and declined to make available workmen who, because of the distance which they lived from the project, would encounter transportation and boarding difficulties (R. 54). However, N. R. S. procured exemptions from the Works Progress Administration, allowing it to refer labor which the petitioner had requested be assigned to the project although such labor was not on the public relief rolls (R. 54). Such exemptions, once they were obtained, remained in effect throughout the performance of the contract (R. 51). Petitioner was likewise permitted to utilize the labor available for more than the stipulated maximum working hours (R. 53).

Works Progress Administration (hereinafter referred to as 'WPA'), sufficient relief labor to refer to the contractor, and WPA made labor available for such referral to NRS in the following categories: First, from persons then working on WPA projects; second, from persons awaiting reassignment to WPA projects; and third, from persons awaiting initial assignments to WPA projects. In the event that those three categories did not provide sufficient labor, WPA was then required to give NRS an exemption from the referral of relief labor, and nonrelief labor was referred to the project.

"A worker referred would be given a referral or assignment slip which he was to take to the contractor and present himself as an applicant for work. Duplicates of this assignment slip were also mailed to the contractor, who was to advise NRS as to whether the man was hired."

Despite the foregoing measures, petitioner suffered delays in performance of the contract because of an insufficient labor force and N. R. S. was unable at various times to refer sufficient labor to enable petitioner to maintain a full complement (R. 53–54). Petitioner's difficulties in this respect were aggravated because, since a considerable amount of the work involved was both unpleasant and intermittent (R. 54–55), its labor turnover was considerable (R. 55), and because of petitioner's insistence in the requisitions it made upon the Employment Service for labor that such labor be thoroughly experienced and equipped (R. 55).[3]

[3] The court below found (R. 55):

"Plaintiff in ordering its labor from the Employment Service specified qualifications for the workmen it desired. On August 24, 1938, it ordered 15 carpenters, the requisition reciting that they 'must have thorough knowledge of the trade and have tools; previous experience on dam construction necessary.' May 7, 1938, plaintiff requisitioned 3 crane operators, the requisition stating that 'they must be thoroughly experienced in operation, care and adjustment on Lorain 75–A crane and shovels.' May 8, 1938, plaintiff ordered 1 dipper tender, the requisition stating that 'he must have had at least 10 years' experience in operation of dipper or dipper dredge.' Also 3 dredge firemen who must be 'thoroughly trained and experienced in firing boilers of all types of floating equipment; cleaning flues and installing and repairing tubes; operating spudding engine, nigger-heads, etc., and shall operate dredge in emergencies.' Also 4 deckhands who shall have 'extensive experience on naval equipment, skilled in throwing lines, etc.' Also 1 cook who 'shall have at least 10 years' experience as cook on floating equipment.'

Petitioner was granted extensions of contract time on account of insufficient labor in the aggegate of 131 days for the years 1935, 1936, and 1937 (R. 54, 56). The court below found that the formula employed in determining these delays was incorrect and that the more correct computation was 103 days (R. 54). In 1938 petitioner was allowed an additional 18 days' extension because of a labor shortage (R. 54). Petitioner unquestionably suffered delays due to the inability of N. R. S. to supply a sufficient number of workmen to the project (R. 71). However, petitioner suffered material delays which were not attributable to a shortage of labor and its failure to complete operations by November 1937 was a result of the combined operations of the delays due to a shortage of labor and other causes (R. 71). With an adequate supply of labor, the project would probably have been completed about June 15, 1938 (R. 71).

November 16, 1938, petitioner filed an itemized claim with the War Department alleging various breaches of contract by the Government and seeking damages therefor and the remission of liqui-

June 21, 1938, plaintiff ordered 4 laborers who must be 'physically fit, willing to do a fair day's work and have previous experience on dam construction.' July 7, 8, and 9, 1938, plaintiff ordered 150 laborers who must be 'physically fit and willing to do a fair day's work with pick and shovel. Will be required to work in water and must report for work supplied with hip boots.' "

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dated damages. The Government was thus advised for the first time that petitioner intended to claim damages against it (R. 69). All liquidated damages assessed against petitioner were thereafter remitted on the recommendation of the Chief of Engineers (R. 69–71), but petitioner was not awarded damages against the United States.

On October 18, 1940, petitioner filed its petition in the court below alleging sixteen causes of action (R. 6–15), of which all but the Second, Third, Twelfth and Fourteenth were bottomed on an alleged breach of contract on the part of the Government for "failure to furnish an adequate supply of labor" (R. 7 *et seq.*). The court below denied recovery on all but petitioner's Fourteenth cause of action, which is unrelated to the issues here presented.[4] Petitioner does not seek review of the dismissal of its Second, Third, and Twelfth causes of action, but asserts that the court below erred in denying it recovery for damages assertedly suffered by reason of the breach of an obligation allegedly assumed by the Government under the contract to supply and maintain a full labor complement.

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[4] The United States has filed a conditional cross-petition for a writ of certiorari requesting review by this Court of that feature of the decision below in the event, and only in the event, that the Court grants the petition here involved. *United States* v. *York Engineering and Construction Company*, No. 783, this Term.

ARGUMENT

The court below, rejecting petitioner's contention that the Government undertook the responsibility of supplying petitioner with sufficient workers, held that Article 19 of the contract basically was a promise by petitioner not to employ labor except as therein provided, and that the Government only undertook "to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79–80). It further held that here the Government had complied with its obligations, and that it was not responsible for the "factors" which prevented petitioner "from getting enough men" (R. 81). It rejected petitioner's contention that the Government should have cancelled the requirements of Article 19, holding that the entire purpose of the relief programs, of which petitioner's project was a part, would otherwise be defeated in its humanitarian purpose of procuring work for those on relief (R. 81), and further that a cancellation of Article 19 would have made no substantial difference in petitioner's labor situation (R. 82). Finally, it rejected petitioner's contention that the Government should have shut down other relief projects to compel men to accept employment with

petitioner. We submit that in so holding the court below was correct.

1. Article 19 does not in terms constitute the United States an insurer of petitioner's labor supply, and there is nothing elsewhere in the contract to suggest that the United States impliedly assumed any greater duty than the court below ascribed. Indeed the contrary would seem to be the case. That part of Article 9 of the standard form contract which deals with excuses for delay, *infra*, pp. 20–22, was specifically modified by the incorporation of an extra provision (R. 21, 28) which excused the contractor from liability for liquidated damages for delay caused by "insufficient supply of qualified labor from offices designated by the United States Employment Service." This clearly indicates that the parties contemplated the possibility of delay from such cause and also fixed the obligation of the United States in that event, namely, to grant a corresponding extension of time. Cf. *United States* v. *Rice*, 317 U. S. 61, 64–65. As noted above, extensions were duly granted, and liquidated damages occasioned by additional delay were remitted.

Petitioner vigorously urges however that, if Article 19 does not make the Government an insurer of its labor supply, it does place a duty upon the Government to waive Article 19 in its entirety if it were impossible for the employment services to furnish, at all times, the number and type of

laborers required. We think, however, that the court below properly rejected this contention. It is inconceivable that the Government, which had undertaken a vast nation-wide work relief program of which the instant project was a part, intended that that program should be impaired because some difficulty in procuring qualified labor might at times be encountered. As the court below observed, it was necessary that the Government keep a careful check on the roll of employees to make certain that the public moneys expended for the purpose of relieving distress should go to those who were in such distress as to be eligible for the relief rolls. The mechanics adopted by the Government to effectuate this purpose were those set forth in Article 19; to make certain that those referred to the work should be persons in need, the contract required that the employees referred to the employer by the United States Employment Service should be taken from the public relief rolls unless the Works Progress Administration should otherwise authorize. It is clear that, if Article 19 were completely waived, the tendency would be to recruit labor among persons not on relief, on the assumption that the more skilled laborers would not be on relief rolls. The court below accordingly concluded that, while the Government was under an obligation to see that the contractor was not unduly delayed, nevertheless it complied with that obligation when it

gave fair consideration to the problems and difficulties of the contractor "so as to enable him to get his work done." We submit that the obligation, if any, assumed by the United States under Article 19 went no further than this.[5]

2. The Government gave due consideration to the difficulties of petitioner in respect of its labor requirements and such labor shortage as resulted was due to circumstances for which the Government was not responsible. When N. R. S. was unable completely to fill petitioner's requisition for workmen, the contracting officer obtained exemptions from W. P. A. so that nonrelief labor

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[5] Petitioner also urges that the decision below is in substantial conflict with the prior decision of the Court of Claims in *Young-Fehlhaber Pile Co.* v. *United States*, 90 C. Cls. 4, and that an authoritative decision by this Court is required to settle the divergence of views between that case and the instant case. Petitioner contends that a uniform rule of law, rather than one dependent on the facts of each case, should be established which should be applicable to all cases of this character. Aside from the fact that the court below found no conflict with the *Young-Fehlhaber* case (R. 82), it is significant to note that consistently since that decision the Court of Claims has tended to dispose of each case on its peculiar facts. This we think is the appropriate approach to the problem as the facts in each case, depending upon the consideration which the Government gave to the contractor's difficulties, should control the ultimate diposition thereof. *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 115–116, certiorari denied, 312 U. S. 697; *Western Construction Co.* v. *United States*, 94 C. Cls. 175, 199–200; *Nolan Brothers* v. *United States*, 98 C. Cls. 41, 81–82; *Merritt-Chapman & Whitney Corp.* v. *United States*, 99 C. Cls. 490, 546–547; *Frazier-Davis Construction Co.* v. *United States*, 100 C. Cls. 120, 158–161.

might be referred to petitioner (R. 51). Once the exemptions were obtained they remained in effect throughout the performance of the contract (R. 51). At critical times permission was granted petitioner to work laborers more hours per week than the 30 specified in the contract. Thus, on December 11, 1935, petitioner was authorized to employ manual labor not more than 8 hours in one calendar day and not more than 40 hours in any one week (R. 53); on May 13, 1936, petitioner was authorized to work carpenters not more than 56 hours in any one calendar week (R. 53); on June 19, 1936, petitioner was permitted to employ tractor operators not more than 56 hours in any one calendar week (R. 53). Where it had an exemption from W. P. A. for men of the classification requested, N. R. S. also referred men whom plaintiff had requested be assigned to the project even though such men were not on relief.

The difficulties which brought about shortages of an adequate supply of labor were not attributable to the Government. Working conditions were not attractive, much of the work having to be done in water (R. 54). There were occasions when rain and cold prevented petitioner from carrying forward the work for more than two or three days a week and workmen were unable to earn enough in a week to make the job worthwhile (R. 54). Many workmen quit to accept employment in coal mines and other projects which

afforded better wages and more satisfactory working conditions (R. 55). Petitioner granted releases to many workmen at such times if it could not assure the men that they would earn reasonable wages (R. 55). Petitioner's requisition for men specified qualifications not likely to be met by many persons living in the area of the work. See note 3, pp. 6–7, *supra*. Certainly in view of the foregoing it could not be said that petitioner's inability to obtain an adequate supply of labor resulted from the failure of the Government to waive Article 19 of the contract. Persons not on relief would be even more unwilling to accept unattractive employment. We submit that the court below was fully justified in concluding that even had Article 19 been waived it would not have materially improved petitioner's labor situation.

3. Finally petitioner contends that the Government violated the terms of the contract because it failed to enforce the provisions of the Emergency Relief Act of 1937, *infra*, pp. 18–19, which forbade the employment of laborers on relief work where they refused to accept an offer of private employment under reasonable working conditions at the same or a greater wage.

This contention is without merit for a number of reasons.

To begin with, the present record contains no evidence that any person on relief, refusing to accept employment with petitioner, continued to

be carried on the relief rolls. The only finding (R. 54) in this respect is that W. P. A. declined to make certain workmen available who were on relief but who were employed on projects carried on under its own supervision which concerned the public health and safety of the community, and similarly declined to make available workmen who lived a considerable distance from petitioner's project and who would be subjected to transportation and boarding difficulties if required to work on petitioner's project.[6]

Next, the Act in question provides that the private employment offered must involve reasonable working conditions. The court below has found in the instant case that at times the work-

[6] Petitioner has appended to its petition an exhibit said to represent the Pennsylvania State Employment Service registration by occupation of employables at Greensburg and Kittanning, Pennsylvania, between August 1935 and October 1938. This is not part of the record before this Court. Had petitioner deemed it desirable to bring evidence of this character before this Court it should have proceeded under Rule 99 (b) of the Court of Claims. It should have made an assignment of error as to the failure of the Court of Claims to make an appropriate finding and requested that this and such other evidence as it deemed material to the error assigned should be incorporated in the record. Had petitioner followed this course, the Government in turn would have counter-designated evidence which justified the court below in refusing to make the finding, such as the examination of the State official in charge of this exhibit which cast grave doubts on its accuracy. Petitioner has advanced no reason as to why it failed to comply with the appropriate rules of the court below in this respect.

ing conditions at petitioner's project were bad (R. 54–55), and that the financial return of persons who lived a considerable distance from the project would be small (R. 54). Petitioner itself at times granted releases to many workmen when it could not give them sufficient work to enable them to earn a reasonable wage (R. 55).

Finally—though this point cannot be reached on the present record—the statutory provision in question was enacted for the benefit of the public, and not of petitioner or persons similarly situated. Like other provisions of relief legislation, it was designed to insure that the expenditure of public funds for relief should benefit the persons most in need of relief. The provision requiring the dismissal of any person who refused a *bona fide* offer of private employment effectuated that purpose. In no sense was the legislation intended to inure to the benefit of the private employer, least of all when such employer invokes it as a basis for imposing legal liability on the United States.

CONCLUSION

The decision below is correct and there exists no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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